Filed 10/1/02 P. v. Cerda CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RICKY GENE CERDA, Defendant and Appellant.	F039888 (Super. Ct. No. 23954B) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Merced County. Dennis A. Cornell, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Rachelle A. Newcomb and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Ardaiz, P.J., Buckley, J., and Levy, J.

After appellant Ricky Cerda waived his right to a jury trial, the trial court found appellant guilty of receiving stolen property (Pen. Code, § 496, subd. (a);[1] count 2) and committing a petty theft after having suffered a prior conviction of a theft-related offense (§ 666; count 3), and found true three "strike" allegations.[2] The court imposed terms of 25 years to life on each offense, and stayed execution of sentence on count 3, pursuant to section 654. The court awarded appellant 279 days of presentence credit, reflecting appellant's incarceration from August 13, 1999, the date of his arrest, through February 15, 2000, the date of his sentencing.

Cerda appealed, and this court held Cerda could be convicted of one, but not both, offenses. We remanded the matter to the trial court for reinstatement and sentencing on whichever of the two convictions the trial court deemed appropriate. On remand, the trial court reinstated the conviction on count 2, dismissed count 3, imposed a sentence of 25 years to life and again awarded appellant 279 days of presentence credit.

On appeal, appellant contends (1) the sentence imposed violated the constitutional proscription against cruel and/or unusual punishment; (2) the court erred in failing to strike appellant's strikes; and (3) the court erred in failing to award appellant presentence credits for the period from his initial sentencing through the date of his resentencing. We will modify the award of presentence credits and, except as so modified, affirm the judgment.

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1 All statutory references are to the Penal Code.

2 We use the term "strike" or "strike conviction" to describe a prior felony conviction that qualifies a defendant for the increased punishment specified in the "three strikes" law (§§ 667, subds. (b)-(i); 1170.12).

FACTUAL BACKGROUND

Instant Offense

In the early evening on August 13, 1999, Kyla Orrick saw two women walk by her house on El Capitan Street in Delhi, followed a few seconds later by appellant. At least one of the women was carrying some items of personal property, and appellant was carrying some picture frames and a picture. Orrick recognized one of the frames as belonging to her friend, Jeanne Klotzer, who owned a house nearby on Palm Street. Klotzer, who lived in Turlock, had asked Orrick to check on her Delhi house from time to time. Orrick approached appellant and accused him of "carrying stolen property." Appellant "began to argue with [Orrick]" and the two "argued back and forth." At some point, Orrick called out to a neighbor to call the police and "grabbed" the pictures and frames from appellant. Thereafter, appellant walked off.

Orrick then "went to confront" the two women. The older of the two women gave Orrick "the items that she was carrying[,]" and apologized.

At some point, Orrick telephoned Klotzer. Klotzer arrived on the scene, viewed some items of personal property that the police had recovered and identified the items as belonging to her. She estimated their value to be $242. She estimated the value of the pictures and frames which, according to Orrick's testimony, appellant had in his possession to be $165.

After viewing her property, Klotzer went to her house on Palm Street. She found that the lock on the front door and been damaged and the inside of the house had been ransacked.

Merced County Sheriff's Deputy Jonathan Knight took appellant into custody and interrogated him. Appellant told the deputy the following: He had been visiting Melissa Spowen and her mother Floyce Spowen at the home of another person who lived on El Capitan Street. The two women asked appellant to "[c]ome and help us carry some stuff." Appellant accompanied them to Klotzer's house on Palm Street. He stood outside

while the two women entered the house and later emerged carrying items of personal property. One of the women asked appellant to carry "some pictures" and appellant did so.

Appellant's Criminal History[3]

Appellant was born in 1969. In September 1986, as a juvenile, he was found to have committed the offenses of assault with a deadly weapon and receiving stolen property, and was committed to the California Youth Authority. He was paroled in February 1990.

In October 1991, he suffered a conviction of vandalism, a misdemeanor, and was placed on three years probation. In August 1993, he was convicted of burglary, a felony, and misdemeanor battery. He was sentenced to 210 days in county jail, and placed on six months probation for the former offense and three years probation for the latter offense.

In October 1993, appellant was convicted of misdemeanor petty theft with a prior, sentenced to 180 days in county jail with 170 days suspended, and placed on three years probation. In April 1994, appellant suffered his three strike convictions: two counts of first degree burglary and one count of second degree robbery. Also in April 1994, he was convicted of being under the influence of a controlled substance. For his strike convictions, appellant was sentenced to six years in state prison.

He was subsequently released on parole, but in February 1998 he was returned to prison for violating his parole. In August 1999, he was convicted of resisting arrest, for which he received 10 days in county jail.

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[3] The summary of appellant's criminal history is taken from the report of the probation officer.

DISCUSSION

Cruel and/or Unusual Punishment

Appellant contends the 25-years-to-life sentence imposed in the instant case constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution and article I, section 17 of the California Constitution.

United States Constitution

At the outset, we determine the applicable standard for determining what constitutes cruel and unusual punishment under the Eighth Amendment. Appellant contends the applicable standard is set forth in *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*). There, the defendant was sentenced under a South Dakota recidivist statute to a life term without possibility of parole after committing his seventh nonviolent felony. A bare majority of the court held that the Eighth Amendment includes a prohibition of "sentences that are disproportionate to the crime committed" (*id*. at p. 284), and found Helm's sentence unconstitutional because it was "significantly disproportionate to his crime . . ." (*id*. at p. 303). The court adopted a three-part test for determining proportionality: "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." (*Id*. at p. 292.)

However, this test did not retain the support of a majority of the court in *Harmelin v. Michigan* (1991) 501 U.S. 957 (*Harmelin*), the United States Supreme Court's most recent statement on whether the Eighth Amendment includes a proportionality guarantee in noncapital cases. Harmelin argued that his sentence violated the Eighth Amendment for two reasons: "first, because it is 'significantly disproportionate' to the crime he committed; second, because the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the

criminal." (*Id*. at pp. 961-962.) The five-justice majority opinion rejected the latter claim, but although the same five justices also rejected the former claim, *Harmelin* did not contain a majority opinion with respect to the proportionality issue. Justice Scalia, joined by Chief Justice Rehnquist, concluded *Solem* was wrongly decided and that the Eighth Amendment does not guarantee proportionality of sentences. (*Id*. at p. 965.) Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment prohibits only sentences which are "grossly disproportionate" to the crime. (*Id*. at p. 1001.) These three justices concluded that consideration of the second and third *Solem* factors is necessary "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." (*Id*. at p. 1005.) When the first factor shows the sentence is constitutional, the analysis is complete. (*Ibid*.)

Appellant argues as follows: Justice Kennedy's "gross disproportionality" test is dicta because the actual basis for the court's holding is set forth in the majority opinion; a court's holding cannot be overruled by dicta; and therefore the *Solem* three-part test survives *Harmelin*. We disagree. Dicta "is the statement of a principle not necessary to the decision." (*People v. Squier* (1993) 15 Cal.App.4th 235, 240, internal quotation marks omitted.) As indicated above, Harmelin attacked his sentence on two grounds, one of which was proportionality. Therefore, Justice Kennedy's concurring opinion and Justice Scalia's discussion of the proportionality issue were necessary to the majority's decision upholding the challenged sentence.

We conclude further that Justice Kennedy's concurring opinion sets forth the applicable standard for determining whether a sentence is unconstitutionally disproportionate. On this point we find persuasive the "head count" analysis utilized by the court in *Hawkins v. Hargett* (10th Cir. 1999) 200 F.3d 1279: "Seven members of the *Harmelin* court (Kennedy, O'Connor, and Souter, JJ., concurring, and White, Blackmun, Stevens, and Marshall, JJ., dissenting) supported some Eighth Amendment guarantee

against disproportionate sentences. However, five Justices (Scalia, J., and Rehnquist, C.J., writing the opinion of the Court, and Kennedy, O'Connor, and Souter, JJ., concurring) rejected the continued application of all three factors in *Solem*. The controlling position is the one 'taken by those Members who concurred in the judgments on the narrowest grounds.' (*Marks v. United States*, (1977) 430 U.S. 188, 193 . . . .) Thus, Justice Kennedy's opinion controls because it both retains proportionality and narrows *Solem*." (*Id*. at p. 1283; see *People v. Cooper* (1996) 43 Cal.App.4th 815, 820 ["The holding of *Solem*, however, was weakened substantially by *Harmelin* . . . ."].)

As indicated above, application of the test set forth in Justice Kennedy's opinion in *Harmelin* begins with the consideration of the first *Solem* factor: the "harshness of the penalty" viewed in relation to the "gravity of the offense." (*Solem v. Helm*, *supra*, 463 U.S. at p. 292.) We turn now to consideration of that factor.

Appellant acknowledges that although "recidivism may be a relevant factor to the sentencing decision[,]" a reviewing court must "look primarily to the current offense." And, he argues, because the instant offense is "extremely minor[,]" an indeterminate life sentence of which appellant must serve at least 25 years[4] is grossly disproportionate.

Appellant bases this argument, in large part, on *Solem.* There, as indicated above, Helm was sentenced to a term of life without the possibility of parole under a South Dakota recidivist sentencing scheme. His only hope of a sentence reduction was an act of executive clemency, an event far less common in South Dakota than the granting of parole where authorized; no life sentence had been commuted in the eight years preceding *Solem*. (*Solem v. Helm*, *supra*, 463 U.S. at p. 302.) The offense that triggered the life sentence was the "uttering [of] a 'no account' check for $100 (*id.* at p. 281, fn.

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4 A felon who, like appellant, has suffered two or more strike convictions cannot have his 25-year minimum term reduced by earning prison worktime credits. (*In re Cervera* (2001) 24 Cal.4th 1073, 1076.)

omitted), and Helm had previously suffered six felony convictions: three counts of "third-degree burglary"[5] and individual counts of "obtaining money under false pretenses"; "grand larceny"; and "third-offense driving while intoxicated" (*id.* at pp. 279-280). In invalidating the sentence, the court acknowledged "that Helm's prior convictions are relevant to the sentencing decision[,]" but, the court stated, "[w]e must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses." (*Id.* at p. 296, fn. 21.) The court found it significant that all of Helms's prior convictions, "although classified as felonies, were . . . relatively minor" and "nonviolent[,] and none was a crime against a person." (*Id*. at pp. 296-297.)

Solem, however, is distinguishable. First, appellant's prior record is more egregious than Helm's because it includes three crimes of violence, one of which, misdemeanor battery, can be described as relatively minor, but two that cannot: robbery, which is now, and was at the time appellant committed the offense, statutorily classified as a serious felony (§ 1192.7, subd. (c)(19)),[6] and assault with a deadly weapon, also a felony. Moreover, appellant's sentence is less severe than Helm's because it does not preclude the possibility of parole.

Appellant's case is more closely analogous to *Rummel v. Estelle* (1980) 445 U.S. 263 (*Rummel*), a case which preceded both *Solem* and *Harmelin* in which the Supreme Court rejected an Eighth Amendment-based challenge to the sentence imposed. Rummel was convicted of obtaining $120.75 by false pretenses and sentenced to life imprisonment under a Texas recidivist statute to which he was subject because he had previously been

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5 The offense of third degree burglary included " 'breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof . . . .' " (*Solem v. Helm*, *supra*, 463 U.S. at p. 279, fn. 1.)

6 The statutory list of violent felonies was amended in 2000 to include "any robbery[.]" (§ 667.5, subd. (c)(9).)

convicted of "fraudulent use of a credit card to obtain $80 worth of goods or services" and "passing a forged check in the amount of $28.36." (*Rummel v. Estelle*, *supra*, 445 U.S. at pp. 265-266.) He would become eligible for parole "in as little as 12 years." (*Id*. at p. 280.) The court noted that "because parole is 'an established variation on imprisonment of convicted criminals,' [citation], a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." (*Id*. at pp. 280-281.)

Here, although the instant offenses are comparable in seriousness to the offense that triggered Rummel's life sentence, his criminal history, because it includes serious and violent offenses against a person, is far more serious. And appellant, like Rummel and unlike Helm, will become eligible for parole.

We recognize Rummel would have been eligible for parole earlier than appellant (12 years as compared to 25 years), but this difference is merely in degree rather than in kind. Thus, we find that appellant's sentence is more akin to the sentence imposed in *Rummel* than to the one imposed in *Solem*. Moreover, we note that "[t]he purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285.) We note further "some common principles that give content to the uses and limits of proportionality review" (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 998) identified by Justice Kennedy in *Harmelin*, specifically the

following: (1) the Eighth Amendment does not require the Legislature to adhere to any specific penological theory; and (2) courts should accord the Legislature substantial deference in determining appropriate punishments (*id*. at pp. 998-1001).

When we apply the foregoing principles and accord proper deference to the Legislature and the electorate of California and consider California's legitimate interest in segregating from society those who continually fail to conform themselves to the law's requirements by repeatedly committing offenses serious enough to be punished as felonies, we conclude the sentence imposed in the instant case does not give rise to an inference of gross disproportionality.

Appellant also places some reliance on two recent Ninth Circuit cases: *Andrade v. Attorney General of the State of California* (9th Cir. 2001) 270 F.3d 743 (*Andrade*) and *Brown v. Mayle* (9th Cir. 2002) 283 F.3d 1019 (*Brown*). In *Andrade*, the court held that a sentence of 50 years to life imposed under the three strikes law was grossly disproportionate to the defendant's offenses, viz., two counts of petty theft with a prior (§ 666), even considering the defendant's three prior residential burglary convictions. The court found that the "unavailability of parole for a half century" made the sentence for the 37-year-old Andrade "the functional equivalent of the sentences at issue in *Solem* and *Harmelin*—life in prison without the possibility of parole." (*Andrade v. Attorney General of the State of California*, *supra*, 270 F.3d at pp. 758-759.)

Brown involved two consolidated cases. The defendant in each was convicted of petty theft with a prior and sentenced to 25 years to life in prison under the three strikes law. Brown had previously been convicted of two counts of burglary, two counts of assault with a deadly weapon, and one count of robbery. Bray had previously suffered four robbery convictions. In invalidating both sentences, the court held "an indeterminate life sentence for a defendant convicted of felony petty theft with a prior who has at least two prior *serious* felony convictions, see § 1192.7, violates the Eighth Amendment's

prohibition against cruel and unusual punishment." (*Brown v. Mayle*, *supra*, 283 F.3d at p. 1036, fn. omitted; original emphasis.)

Decisions of the federal circuit courts, however, are not binding on this court. (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) In our view, *Brown* and *Andrade* are contrary to Supreme Court precedent. Specifically, these cases are contrary to the principle set forth in *Rummel* that "segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes[,]" and the principle, also set forth in *Rummel* and in Justice Kennedy's concurring opinion in *Harmelin*, that courts must give substantial deference to a state's determination of "the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society . . . ." (*Rummel v. Estelle*, *supra*, 445 U.S. at p. 284.) Accordingly, we find both cases unpersuasive and we decline to follow them.

The sentence imposed in the instant case does not give rise to an inference of gross disproportionality, and therefore, the Eighth Amendment does not require a comparison of his sentence to other sentences both within and outside the jurisdiction. Accordingly, we conclude appellant's sentence does not violate the Eighth Amendment.

California Constitution

In *In re Lynch* (1972) 8 Cal.3d 410, our Supreme Court held a punishment may violate the California Constitution "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Id*. at p. 424, fn. omitted.) To administer the general rule, the court distilled three techniques from federal and sister-state cases. These techniques are virtually identical to the three-part *Solem* analysis. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359.) They are as follows: (1) "examin[ing] the nature of the offense and/or the offender, with particular regard to the

degree of danger both present to society" (*id.* at p. 425); (2) comparing "the challenged penalty with the punishment prescribed in the same jurisdiction for different offenses which, by the same test, must be deemed more serious" (*id*. at p. 426, emphasis omitted); (3) comparing the "challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision" (*id.* at p. 427, emphasis omitted).

In *People v. Dillon* (1983) 34 Cal. 3d 441, our Supreme Court, in holding the punishment for first-degree murder was cruel or unusual punishment under the facts (*id*. at p. 450), refined the offense/offender technique. "[T]he courts are to consider not only the offense in the abstract--i.e., as defined by the Legislature--but also 'the facts of the crime in question' [citation]--i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Id*. at p. 479.) "[T]he courts must also view 'the nature of the offender' in the concrete rather than the abstract: although the Legislature can define the offense in general terms, each offender is necessarily an individual. . . . This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid*.)

"The three prongs or factors enumerated in *Lynch* are not absolute tests to be mechanically applied but serve only as guides." (*People v. King* (1993) 16 Cal.App.4th 567, zorf.) As under the federal proportionality analysis, "[d]eterminations whether a punishment is cruel or unusual may be made based on the first prong alone." (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399.)

For the same reasons appellant's sentence does not give rise to inference of gross disproportionality under the Eighth Amendment analysis, we conclude that upon

consideration of the offender/offense guideline under *Lynch*, appellant's sentence does not violate the California constitutional proscription against cruel or unusual punishment. As this court said of the defendant in *People* v. *Cooper*, *supra*, 43 Cal.App.4th 815, "The imposition of a 25-year-to-life term for a recidivist offender, like appellant, convicted of a nonviolent, nonserious felony but with at least 2 prior convictions for violent or serious felonies is not grossly disproportionate to the crime." (*Id*. at p. 825.) "In view of the danger to the safety and peaceful enjoyment of life and property that such offenders pose to society, the imposition of a 25-year-to-life sentence for third strikers, like appellant, does not shock the conscience or offend fundamental notions of human dignity. Accordingly, appellant's sentence is not disproportionate and does not constitute cruel or unusual punishment under the California Constitution." (*Id*. at p. 828.)

Court's Failure to Strike Appellant's Strike Convictions

Appellant asked the trial court to exercise its discretion under section 1385, subdivision (a) to strike two or all three of his strike convictions. The court refused to strike any of appellant's strikes. This refusal, appellant argues, was error. Specifically, appellant argues as follows: (1) the court abused its discretion because the prison term imposed was "grossly disproportionate" to the instant offense; (2) even if not unconstitutionally cruel and unusual, the sentence nonetheless constituted "cruel punishment"; and (3) because the instant offense is one that can be punished as either a felony or a misdemeanor, imposition of a 25-years-to-life sentence was "outside the spirit of the Three Strike's law." We disagree.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530 (*Romero*), the California Supreme Court concluded that "section 1385[,] [subdivision] (a) . . . permit[s] a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law."

"The Supreme Court has set out guidelines for lower courts to apply in deciding whether to strike a prior Three Strikes conviction under *Romero*. The touchstone for that

determination is whether 'in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citations.] "Our Supreme Court has also made it clear that appellate review of a trial court's decision on a *Romero* motion is not de novo. ' "[T]he superior court's order [i]s subject to review for abuse of discretion. This standard is deferential. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." ' " (*People v. Cluff* (2001) 87 Cal.App.4th 991, 997-998; emphasis omitted.)

There is no indication the court acted unlawfully or capriciously in this case. Appellant's history of criminal activity began in 1986 when he was 17 years old. As indicated above, in addition to the instant offense, appellant has suffered three felony convictions serious enough to qualify as strikes, one other felony and numerous misdemeanors. He has received multiple grants of probation and parole and has served a prison term and a Youth Authority commitment. Thus, appellant has demonstrated a continuing pattern of reoffending regardless of past sanctions and attempts to rehabilitate through the juvenile justice system, probation and parole. The relatively minor nature of the instant offense only suggests this matter may have been within the range of cases as to which the trial court had discretion under section 1385 to strike one or more prior convictions, but that factor does not compel the striking of a strike. It was not irrational for the court to refuse to treat appellant as if he had not previously been convicted of one or more serious and/or violent felonies, and we decline appellant's invitation to substitute our discretion for that of the trial court.

Presentence Credits

As indicated above, on February 15, 2000, when appellant was initially sentenced, the court awarded him 279 days of presentence credit. However, although appellant has been incarcerated in state prison since he was delivered to the Department of Corrections following his initial sentencing, the court did not award any further presentence credits when it resentenced appellant on January 30, 2002, following this court's remand.

Appellant first argues, and the People concede, that the court erred in failing to award him actual time credit for the time he spent in custody from his initial sentencing to his resentencing. We agree. "Everyone sentenced to prison for criminal conduct is entitled to credit against his term for actual days of confinement sorely attributable to the same conduct." (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) Section 2900.1 governs the application of this general principle where, as here, a defendant remains in prison after a conviction is reversed, but the defendant is subsequently resentenced based on the same conduct that gave rise to the original conviction; the statute provides, "Where a defendant has served any portion of his sentence under a commitment based upon a judgment which judgment is subsequently declared invalid . . . such time shall be credited upon any subsequent sentence he may receive upon a new commitment for the same criminal act or acts." (§ 2900.1.) As the court in *Buckhalter* stated, "[w]hen[] . . . appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the 'subsequent sentence.' (§ 2900.1.)" (*Id*. at p. 23.) Thus, the trial court erred in failing to award appellant credit for the 902 days of actual time appellant served from February 15, 2000, the date of his original sentencing, to January 30, 2002, the date of his resentencing following remand.

Appellant next argues the court erred in failing to award him good behavior credits under section 4019 for that same period. Appellant does not dispute that section 4019 provides for good behavior credits of up to two additional days for every four days spent

in custody "prior to imposition of sentence for a felony conviction" (§ 4019, subd. (a)(4)), and that once a convicted felon is delivered to the custody of the Director of Corrections at a designated state prison and begins serving time "in the custody of the Director" (§ 2933, subd. (a)), section 4019 no longer governs the earning of credits, and said felon earns credits, if at all, under different statutory authority, viz., article 2.5 of chapter 7 of title 1 of part 3 of the Penal Code (commencing with section 2930).[7] He argues, however, that although the time for which he seeks section 4019 credits was served in state prison, when this court reversed his convictions his incarceration was converted to presentence detention to which section 4019 is applicable, and it remained so until his resentencing. We disagree.

Section 4019 provides that its formula for good behavior credit applies to persons detained, prior to felony sentencing, "in a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp . . . ." (§ 4019, subd. (a)(4).) *Not* listed is state prison. Therefore, by its terms, the credits scheme contained in section 4019 does not apply to the period appellant spent in state prison following this court's reversal of his convictions. (See *People v. Buckhalter*, *supra*, 26 Cal.4th at p. 39, fn. 9 [stating, in dicta, that good behavior credits under section 4019 are not "available to persons confined in state prison"].)

Appellant bases his claim to section 4019 credits on three cases: *People v. Chew* (1985) 172 Cal.App.3d 45, *People v. Thornburg* (1998) 65 Cal.App.4th 1173 and *People v. Robinson* (1994) 25 Cal.App.4th 1256.

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[7] Subject to certain exceptions, credits earned under article 2.5, commonly known as prison worktime credits, are available only to those sentenced under section 1170, the Determinate Sentencing Act. (*People v. Buckhalter*, *supra*, 26 Cal.4th at p. 31.) The three strikes law provides no exception to this general rule. (*Id*. at p. 32.) Thus, appellant, who is serving an indeterminate life sentence mandated by the three strikes law is not eligible to earn prison worktime credits. (*Ibid*.)

Chew does not support appellant's claim, notwithstanding the following statement in *Chew*, upon which appellant relies: "time spent in prison between the initial sentencing and resentencing or a new sentence is properly characterized as *presentence* time." (*People v. Chew*, *supra*, 172 Cal.App.3d at p. 47, fn. omitted, emphasis added.) This statement must be examined in context.

The defendant in *Chew* was originally sentenced and delivered to prison, where he thereafter remained, serving the term imposed. On his "partially successful" first appeal (*id*. at p. 47), the case was remanded for resentencing. The defendant was "once again sentenced to . . . the term of three years and eight months." (*Ibid*.) The trial court awarded 301 days of sentence credit for the prior prison time, including 201 days of actual confinement and 100 days of good behavior credit under section 4019.

The defendant again appealed. He argued, in a reverse of the contention raised by appellant in the instant case, that his intervening time in state prison should have been credited *not* with the section 4019 good behavior credits, but instead with prison worktime credits under the more generous formula set forth in section 2933. The People agreed that the defendant, who had remained in prison confinement, was ultimately entitled to prison worktime credits. The sole argument raised by the People was that the accrual and award of such prison credits, insofar as actually earned, was not the province of the trial court but the administrative responsibility of the Department of Corrections.

The court in *Buckhalter* summarized the *Chew* court's holding as follows: "The [*Chew*] court . . . agreed with both parties that, while confined in prison awaiting resentencing, the defendant could accrue article 2.5 prison worktime credits against the sentence ultimately imposed. However, the court accepted the People's view that it was for the Department of Corrections, not the trial court, to determine what worktime credits the defendant had accumulated under applicable prison rules. Finally, in dictum, the court declared that time spent in a county jail pending a sentencing remand is also subject to presentence good behavior credits under section 4019, and that the award of such

credits is the trial court's responsibility. [¶] *Chew* thus concluded that upon resentencing, section 2900.5, which sets forth the trial court's duty to calculate presentence credits, 'requires the sentencing court to determine the actual days of physical confinement of the nonprison kind, including the extra or bonus credits earned [under section 4019] in the [county] jail . . ., and the [actual] number of days served in prison pending resentencing. [On the other hand,] [o]ther code sections (§§ 2930-2935) assign to the Director of Corrections the duty of determining prison behavior and worktime credits, including the determination of appropriate worktime credits while the defendant is away from prison awaiting resentencing.' " (*People v. Buckhalter*, *supra*, 26 Cal.4th at p. 38.)

Assuming *Chew* remains a viable precedent,[8] it does not support appellant's position. As indicated above, in that case both the parties and the court agreed that a defendant confined in state prison awaiting resentencing following remand cannot earn credits under section 4019. The court's statement that such confinement is "presentence time" does not indicate otherwise. That statement must be understood in light of the court's holding that it was the duty of the Director of Corrections to determine prison behavior and worktime credits for a defendant confined in state prison awaiting resentencing, but it was the duty of the sentencing court to calculate the number of days

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8 *People v. Buckhalter*, *supra*, 26 Cal.4th 20 held that "an appellate remand solely for the correction of a sentence already in progress does not . . . restore the prisoner to presentence status as contemplated by section 4019" (*id*. at p. 33), and disapproved *Chew*, as well as *Thornburg* and *Robinson*, discussed *infra*, insofar as those cases are inconsistent with that conclusion (*id*. at p. 40). The People argue that the instant case is controlled by the holding quoted above. Appellant counters that because in the instant case appellant's *convictions* were reversed, the remand was not "solely for the correction of [his] sentence . . . ." (*Id*. at p. 33.) We need not resolve this dispute, in that we reject appellant's claim for section 4019 credits on the narrow ground that such credits may not be awarded on the basis of the time a defendant is confined in state prison.

spent in such custody, pursuant to the requirement of section 2900.5 that the sentencing court "determine the date or dates of any admission to, and release from, custody *prior to sentencing*. . . ." (§ 2900.5, subd. (d), emphasis added.) The court simply meant that the time spent confined prior to remand for resentencing, whether spent in prison or local custody, was time "prior to sentencing" for purposes of the court's duty under section 2900.5, subdivision (d) to calculate the number of days in custody.

Thornburg is also inapposite. There, on the defendant's first appeal, the appellate court affirmed the conviction but remanded for resentencing in light of the holding in *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at page 514. On remand, the court reimposed the original four-year prison term, but "denied the defendant's request for additional custody credits and a new abstract of judgment." (*People v. Thornburg*, *supra*, 65 Cal.App.4th at p. 1175.) On the second appeal, the court reversed and held as follows: "it is the duty of the sentencing court to calculate actual days spent in custody pursuant to section 2900.5, subdivision (d). This includes time spent in jail pending resentencing. (*People v. Chew* (1985) 172 Cal.App.3d 45, 50 . . . .) It is the sole province of the CDC to determine prison behavior and work credits. (*Ibid*.; see also *People v. Robinson* (1994) 25 Cal.App.4th 1256, 1257-1258 . . . .) Thus, the trial court should have calculated the total number of actual days spent in custody, whether jail or prison, added the appropriate number of section 4019 conduct credits, and issued an amended abstract." (*Id*. at pp. 1175-1176.) Thus, *Thornburg* simply followed *Chew*. Although the *Thornburg* court ordered the trial court to determine the number of days spent in custody, "whether in jail or prison[,]" and award "an appropriate number of" section 4019 credits, nothing in *Thornburg* indicates that "appropriate number of section 4019" credits should reflect days of prison confinement.

Similarly, in *Robinson*, the defendant argued, the Attorney General conceded and the court held the trial court's failure to "calculate and credit with the number of days spent in prison custody" following remand for resentencing was error. (*People v.*

Robinson, *supra*, 25 Cal.App.4th 1256, 1257-1258.) And, the court stated, following *Chew*, calculation of worktime credit "is the province of prison administration." (*Id*. at p. 1258.) Again, however, nothing in this case indicates that notwithstanding the sentencing court's duty to calculate actual time, the court was required to compute and award section 4019 credits for time served in prison.

Thus, although as demonstrated above the court erred in failing to award appellant actual time credits for the time appellant served in prison prior to resentencing, appellant is not entitled to section 4019 credits for that time.

DISPOSITION

The judgment is modified to provide that the appellant is awarded 902 days of actual time credit in addition to court's award of 279 days of presentence credit, for a total of 1,181 days of presentence credit. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment indicating the modification set forth above, and forward a copy of the amended abstract to the Director of Corrections.